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No. 99-731

Supreme Court, U.S.
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In the Supreme Court of the United States

SHAMMARA RICHARDS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. RICHARDS, JR., AND AS GUARDIAN AND NEXT OF KIN OF SHANEE A. RICHARDS AND CHARLES RICHARDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As we have shown (Pet. 11-14), the Third Circuit here applied a legal test for defining "activity incident to service" under *Feres* v. *United States* that conflicts with those employed by other circuits. If Shammara Richards had filed her lawsuit in the Second, Eighth, or Ninth Circuits, or in other circuits that apply tests different from that of the Third, her FTCA claim would have been allowed to proceed. Pet. 14-18. Indeed, the Third Circuit's own reasoning makes it clear that under the different methodologies used by the Second, Eighth and Ninth Circuits, Mrs. Richards would have prevailed. *Id.* at 7-8, 15-17.

To resolve that serious conflict and clarify this muddled area of federal law, this Court should grant review of the first question presented, which concerns *Feres*'s scope and application. By including the second question presented, we also ask this Court to honor the request of four judges of the Third Circuit, who, in an extraordinary dissent from the denial of rehearing *en banc*, implored this Court to "grant certiorari to revisit" *Feres* and consider "the compelling argument for [its] abandonment." Pet. App. 11a, 12a.

The government's opposition merely wishes away the juridical chaos that *Feres* continues to breed, as we explain. And the government fares no better in suggesting that the Court should refuse to consider overruling *Feres* even if it grants the first question presented. Review of both issues is warranted.

1. *The Government's Attempt To Deny The Conflict Concerning* Feres*'s Scope Is Unavailing.* The courts of appeals take at least five different approaches to determining whether an injury arises from activity that is "incident to service." Pet. 12-14; see also Br. of *Amici Curiae* The Ass'n of Trial Lawyers of America *et al.*, at 4-7. The Third, Seventh, Eleventh, and D.C. Circuits consider various factors without regard to *Feres*'s rationales. The First, Fourth, Fifth, Sixth, and Tenth Circuits consider various

factors but only insofar as they advance *Feres*'s rationales. The Eighth Circuit considers *Feres*'s rationales alone. The Ninth Circuit, having "reluctantly recognized * * * that [a] reconciliation of prior pronouncements on the [*Feres*] doctrine is not possible," *Dreier* v. *United States*, 106 F.3d 844, 848 (9th Cir. 1996) (citation and internal quotation marks omitted), considers how a particular case compares on its facts to others decided by that circuit. The Second Circuit, finally, considers whether at the time of injury a service member is acting within the scope of his military employment (subject to an exception in the "extreme case" where the discipline of the military tortfeasor would be implicated). Given that, as the Third Circuit noted here, "[t]he Supreme Court has not articulated a specific method for determining whether an injury is 'incident' to military service" under *Feres* (Pet. App. 4a), it should hardly be surprising that the courts of appeals have veered off in different directions.

a. In response, the government insists that all the courts of appeals engage in the same two-step inquiry. According to the government, every circuit first considers "the same basic factors in determining whether an injury is incident to service" (Opp. 6) and dismisses a claim if that analysis "clearly supports applying *Feres*" (*id.* at 7). If, however, "the totality of the circumstances" does not "unambiguously" support a *Feres* bar, courts proceed to "review the rationales underlying the doctrine to verify that allowing the suit would not significantly impair the military mission" (*id.* at 8).

The government's characterization of the cases cannot be reconciled with the law in the Second, Eighth and Ninth Circuits. To begin with, although we discussed them in the petition (at 14), the government fails even to mention either the Eighth Circuit's "rationales only" approach or the Ninth Circuit's "most similar case" approach (perhaps because neither fits within the government's grand theory).

As for the Second Circuit, the government admits that Judge Guido Calabresi's scholarly and rigorous opinion in *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995), which sets forth and applies a distinct "scope of employment" test, represents an "apparent departure" from the law in other jurisdictions, but it suggests that *Taber* has been "implicitly repudiated" by a later panel of the Second Circuit. Opp. 8 n.7 (citing *Wake* v. *United States*, 89 F.3d 53 (2d Cir. 1996)). That is wishful thinking. The panel in *Wake* held simply that "the scope of employment considerations" of *Taber* did "not come into play" because the case before it fell within the exception in *Taber* for cases implicating "tortfeasor-related discipline considerations" (89 F.3d at 61) — hardly a repudiation, explicit or implicit. Of course, as the government well knows, the panel in *Wake* could not have overruled *Taber* even had it wanted to do so, as one panel cannot change the law of the circuit (see, *e.g.*, *Lee* v. *Commissioner*, 155 F.3d 584, 587 (2d Cir. 1998)). See also *Skees* v. *United States*, 107 F.3d 421, 425 n.3 (6th Cir. 1997), decided after *Wake*, which read *Taber* as embodying "the Second Circuit's approach" to *Feres* (and rejected it).

b. As we explained (Pet. 7-8, 14-17), this case would have come out differently under the approaches used in the Second, Eighth, and Ninth Circuits. If the Third Circuit had applied the Second Circuit's "scope of employment" test, Mrs. Richards's claim would have been allowed to proceed. *Id.* at 15. If the Third Circuit had applied the Eighth Circuit's "rationales only" approach, it would not have barred her claim either; so much is clear from the Third Circuit's opinion, in which the panel emphasized that *Feres*'s purposes did *not* support application of the doctrine in this case. *Id.* at 15-16; Pet. App. 8a-10a. And Mrs. Richards would have prevailed in the Ninth Circuit under its "most similar case" approach because, as *both* of the courts below recognized, the most similar cases in the Ninth Circuit yielded that result. Pet. 14, 16-17; Pet. App. 5a, 17a. Tellingly, the government in no way suggests that it, as

opposed to Mrs. Richards, would have prevailed under the approaches of the Second, Eighth, or Ninth Circuits. This obvious conflict, on the critical question of *Feres*'s scope, is reason enough to grant review of the first question presented.

c. The government also seeks to minimize the differences between those circuits that consider various factors alone and those that consider various factors but only insofar as they advance *Feres*'s rationales. According to the government, *Feres*'s "rationales" are "incorporated" in the "factors" (Opp. 7), and thus the "factors only" and the "factors plus rationales" approaches are in essence the same. The government's argument, however, is fatally defective.

To begin with, it is logically incompatible with the two-step approach to *Feres* that the government claims is applied in every circuit. If *Feres*'s rationales were actually "incorporated" in such factors as the situs of the injury and the duty status of the victim, the application of the factors would always be dispositive; there could never be a case where the factors would permit the suit but the rationales might nonetheless preclude it. But while under the government's theory there could never be occasion to consider the justifications for *Feres*, several courts of appeals do just that, barring a case under *Feres* only if the application of the factors serves *Feres*'s underlying purposes. See Pet. 12-13.

Illogic aside, the supposed correspondence of the various factors and *Feres*'s purposes is illusory. Consider, for instance, the fact that Mr. Richards had no choice but to commute to work on a state-run, though federally-owned, highway that crossed the 110,000-acre Fort Knox as part of the main route from Brandenburg, Kentucky to Louisville; it was no real surprise, then, that the accident in which he was killed on the way home occurred on what was technically federal property. Had he been stationed at the 170-acre Fort Hamilton in Brooklyn, New York, in contrast, Mr. Richards would almost certainly have lived off-post, and an accident

on the way home would almost certainly have occurred outside the installation, on the streets of Bay Ridge. In either case, what possible bearing could the "location of the accident" (Opp. 6) have on the "federal relationship" between service member and government, or the degree of judicial intrusion into military affairs? Nor, by the same token, does duty status correlate to *Feres*'s compensation rationale; whether on leave or active duty, all members of the Armed Forces are eligible for the voluntary Servicemen's Group Life Insurance, as well as benefits such as the $6000 "death gratuity." (In that regard, note that not even the government suggests that military benefits are remotely comparable in value to the tort remedies available to all other Americans.) What is more, *Feres*'s purposes are in considerable tension with one another, because the rationales, depending on which is emphasized, point courts to different outcomes. See also *United States* v. *Johnson*, 481 U.S. 681, 694-700 (1987) (Scalia, J., dissenting) (explaining why the rationales make no sense); Br. of *Amici Curiae* Bonnie and Edmund O'Neill, at 2-5.

It is worth noting, finally, that the Third Circuit here rejected the notion that *Feres*'s rationales are incorporated in the factors. It is precisely because the factors do *not* reflect the rationales on which *Feres* is supposedly grounded that the "factors only" approach, as the Third Circuit wrote here, leads to "disconnect[s]" between "the philosophy behind *Feres* and its application," and thus "counter-intuitive and inequitable result[s]" (Pet. App. 8a, 10a).

d. While the government asserts that the "most similar cases" to this case come out the same way (Opp. 9), the distinctions drawn by courts that come out differently are meaningless. Mr. Richards was off duty for the day, headed home for the evening to care for his wife and child, when he was killed on a state-run highway that crosses Fort Knox just before he reached the town of Muldraugh, Kentucky. The plaintiff in *Pierce* v. *United States*, 813 F.2d 349 (11th Cir.

1987) (per curiam), to take one example of many, was running errands in the middle of the work day, headed back to work with a stop at his on-post quarters, when he was unlucky enough to get hit by a car on a state-run highway that crosses Fort Stewart — but lucky enough to get hit within the city limits of Hinesville, Georgia, just 500 feet before he would have arrived on federal land. Mrs. Richards's suit was barred; Mr. Pierce's suit went forward. That these cases and others turn on such trivial distinctions is reason why (as *amici* Bonnie and Edmund O'Neill point out) the *Feres* doctrine should be clarified — or abandoned.

e. In a final effort to defeat review of the first question presented, the government avers that "[c]ourts have had little difficulty applying the *Feres* doctrine." Opp. 12. That is sheer fantasy. The government's view would no doubt surprise Judges Calabresi and Leval (among many others) who called *Feres* "extremely confused and confusing," *Taber*, 67 F.3d at 1038, not to mention the federal judges who heard this case. In fact, the lower courts here agreed about one thing: that "the two circuits that have considered factually similar cases" (the Ninth and Eleventh) "are split." Pet. App. 19a; see *id.* at 5a, 23a. But though the government maintains that the Third Circuit and the district court found a *Feres* bar for "essentially the same reasons," (Opp. 3), the courts actually *disagreed* over whether the "factors" and "purposes" required dismissal. While the district court ultimately held that application of the factors was "inconclusive" (Pet. App. 19a), the Third Circuit ruled that the factors barred recovery (*id.* at 4a-8a). The district court ruled that recovery was barred by *Feres*'s purposes (*id.* at 19a-22a), whereas the Third Circuit reached exactly the opposite conclusion (*id.* at 8a-10a). This disagreement is illustrative, and it is no wonder, then, that scores of federal judges have criticized *Feres* not only because they think it illegitimate and unfair, but because they have no idea how to determine whether activity is "incident to service" in given cases. See Pet. 20-24.

The government does not deny that the first question presented raises an important and recurring issue of federal law. Its only argument against review is to deny or diminish the conflict among the circuits. Since that basis for resisting review is meritless, this Court should at a minimum grant review of the first question presented.

2. *The Court Should Also Take This Opportunity To Reexamine* Feres *Itself.* As we explained in the petition (at 20-29), review of the first question presented, which asks that the *Feres* doctrine be clarified, justifies the Court's review of the second question, which asks that *Feres* be revisited, since the decision whether to overrule *Feres* completely is a logical precursor to the decision on how to clarify the doctrine in application. The government's arguments to the contrary are unpersuasive.

a. The government stresses that this Court, by a 5-4 vote, declined to modify *Feres* in *United States* v. *Johnson*, 481 U.S. 681 (1987). Opp. 10-12. The government also observes that the Court has denied certiorari in cases since *Johnson* "where the only question presented * * * is whether *Feres* should be reexamined." *Id.* at 12. And the government suggests that nothing since *Johnson* has changed.

This argument misses the mark. First, the government overlooks the extraordinary criticism leveled at *Feres* in recent years by the federal courts. In this case, for example, Chief Judge Becker and three other members of the Third Circuit called the *Feres* doctrine a "travesty" and urged the Court to grant certiorari, to revisit *Feres,* and to overrule it. That, to say the least, is remarkable. Other critics of *Feres*, moreover, have joined the Court since *Johnson* was decided. See *Lombard* v. *United States*, 690 F.2d 215, 228-30 & n.7, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring and dissenting in part), cert. denied, 462 U.S. 1118 (1983); *Veillette* v. *United States*, 615 F.2d 505, 506 (9th Cir. 1980) (per Fletcher, J., joined by Kennedy, J.). And as the petition documented (at 20-24), judicial and academic criticism of

Feres is legion, and (no doubt in response to the persuasive analysis set forth in the *Johnson* dissent) the volume of the criticism has been increasing steadily.

This Court often denies review to allow an issue to percolate in the lower courts, out of a healthy respect for the assistance that will be provided by the work of the circuit judges. But where, as here, judges in nearly every federal jurisdiction express profound misgivings about one of this Court's decisions, the Court should not turn a deaf ear. If for no other reason than to put these serious concerns finally to rest (one way or another), review is warranted.

The government's argument also overlooks the fact that this case, unlike ones in which review has been denied, presents an independently certworthy question relating to *Feres*'s meaning and scope. If (as we suggest), the Court should grant review of the first question presented, considering the second question presented would represent only a modest additional investment of this Court's resources. Moreover, this would avoid the problem that arose in *Johnson*, see 481 U.S. at 688 n.9, where the further validity of *Feres* was not challenged and was not the subject of full briefing (though four Members of this Court nevertheless concluded that *Feres* is indefensible).

The government is wrong to say that its previous filing in *Sonnenberg* v. *United States*, No. 90-539, "responds fully to the arguments petitioner advances in seeking reexamination of *Feres*." Opp. 12. In fact, our petition identified evidence from the FTCA's legislative history that was not discussed by the Court in *Johnson* or addressed by the government in *Sonnenberg*. See Pet. 25-26. We noted, for instance, the *Feres* Court drew the "incident to service" test from *a statute that the FTCA had repealed*, a point that the *Feres* Court failed to grasp. Pet. 25-26. This is but one example of the kind of evidence, along with new academic

commentary and opinions such as that by Judge Calabresi in *Taber*, that this Court can, and should, evaluate in addressing the validity of *Feres*.

b. Predictably, the government rehashes its arguments from *Sonnenberg* about *stare decisis*; we anticipated those arguments in the petition (at 27-29), and the government offers nothing new in response. As for our point that *Feres* is unworkable (Pet. 24), the government makes no attempt to explain how *Feres*'s "incident to service" test is any different from the "confusing and difficult" "service connection" test that this Court overruled in *Solorio* v. *United States*, 483 U.S. 435 (1987). And the government's reliance on Congress's silence in the years since *Feres* is misplaced, because, as the Court has repeatedly said, legislative inaction may result from a variety of reasons that do not imply any endorsement of this Court's decisions. See, *e.g.*, *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."); see also *Johnson*, 481 U.S. at 702-03 (Scalia, J., dissenting).

c. Lastly, the government offers an abbreviated defense of *Feres* on the merits. Opp. 11-13. Most striking about the defense, of course, is the total absence of any hint that the *Feres* doctrine could possibly be justified by reference to the text, the structure, or the legislative history of the FTCA. See Pet. 2-4, 24-27; Br. of *Amici Curiae* Bonnie and Edmund O'Neill, at 5-7, 8-10. Instead, the government argues that *Feres* is a good thing for reasons of policy.

As a pure policy matter, however, the *Feres* doctrine has little to recommend it. The policy rationales offered by the government simply do not withstand scrutiny, as the *Johnson* dissent persuasively demonstrated, 481 U.S. at 694-700. Courts that have decided the issue on policy grounds have had little difficulty rejecting the doctrine. The New Hampshire Supreme Court, for example, in an opinion joined by Justice Souter, rejected a *Feres*-like bar to certain

claims by national guardsmen arising out of military medical malpractice. *Tilton* v. *Dougherty*, 126 N.H. 294, 299-300, 493 A.2d 442, 445-46 (1985); see also *United States* v. *Stanley*, 483 U.S. 669, 709-10 (1987) (O'Connor, J., concurring and dissenting) (refusing to apply a "judicially crafted rule" such as *Feres* to shield unconscionable conduct from liability). We note, moreover, that the Court in *Johnson* was never presented with the full range of policy considerations that weigh against *Feres*. For example, by insulating military personnel from the regulatory effects of tort suits, *Feres* may have contributed to the appallingly substandard levels of care in military medical facilities. See, *e.g.*, *Military Quacks: It's Time to Repair the Military Medical System*, WASH. MONTHLY, Sept. 1, 1998, at 22; *Military Medicine: Flawed and Sometimes Deadly*, DAYTON DAILY NEWS, Oct. 5-11, 1997, at 1A (7-part series). Finally, while the government asserts that the *Feres* doctrine is both "indispensable" and "fair" (Opp. 13), the three Third Circuit judges who called the result here "inequitable," the four Third Circuit judges who called *Feres* a "travesty," numerous other judges and commentators — and, not least, victims of military negligence such as Shammara Richards and *amici* Bonnie and Edmund O'Neill — obviously disagree.

A full debate over the merits of *Feres* is of course premature (and might never take place given the government's eagerness to settle cases that present conflicts among the circuits, see *Kendrick* v. *United States*, No. 89-6143, or that conflict with *Feres* itself, see *Elliott* v. *United States*, 13 F.3d 1555 (11th Cir.), vacated, 28 F.3d 1076 (11th Cir.), judgment aff'd by equally divided court, 37 F.3d 617 (11th Cir. 1994) (discussed in the petition at 17)). If there is to be such a debate, though, this case is an ideal vehicle, offering an independently certworthy issue, a manageable record, and the prospect of thorough briefing and argument by both sides. And if the government really believes in the *Feres* doctrine, it should welcome this opportunity to silence *Feres*'s critics once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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